Statement of Gigi B. Sohn, President
Public Knowledge

Before the
House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property

Oversight Hearing on
"Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole"

Washington, DC
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Chairman Smith, Ranking Member Berman and other members of the Subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that a nonprofit organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Subcommittee for inviting me to testify on content protection in the digital age, and to comment on what I hope to be the first of many discussions on three draft pieces of legislation before the subcommittee, the Broadcast Flag Authorization Act (BFAA), the HD Radio Content Protection Act (HDRCPA) and the Analog Content Protection Act (ACPA).[1]

Introduction and Summary

As some of you know, I served as counsel to the nine public interest and library groups that successfully challenged the Federal Communications Commission's (FCC) broadcast flag rules in the United States Court of Appeals for the District of Columbia Circuit. My organization financed and coordinated the case, which is titled *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). I respectfully request that a copy of the court's decision and a copy of petitioners' opening brief in the case be placed into the record of this hearing.

For Public Knowledge, its members and its public interest allies, the D.C. Circuit's decision vacating the broadcast flag rules is about much more than the ability of citizens to make non-infringing uses of copyrighted material that they receive over free over-the-air broadcast television. It is about limiting the power of a government agency that, in the court's own words, has never exercised such "sweeping" power over the design of a broad range of consumer electronics and computer devices.

For the past seventy years, Congress has never given the FCC such unbounded authority to control technological design. This has fostered a robust market place for electronic devices that has in turn made this country the leader in their development and manufacture. The broadcast flag scheme would put a government agency in the position of deciding what software and hardware technologies will come to market and which will fail.

I urge this subcommittee to think very long and hard before granting the FCC broad power to engage in this kind of industrial policy. Ask yourselves, is it good policy to turn the Federal Communications Commission into the Federal Computer Commission or the Federal Copyright Commission? I am confident that with the opportunity for public input and serious deliberation and an opportunity for public input, you will decide that the marketplace, not the government, is the best arbiter of what technologies succeed or fail, and that Congress, not the FCC, is the correct arbiter of the proper balance between content protection and consumer rights.

I similarly urge this subcommittee to weigh the costs to consumers of proposals to mandate content protection for digital satellite and broadcast radio and to mandate

[1] I would like to thank Neil Chilson, Public Knowledge's legal intern, Heidi Wachs, Public Knowledge's legal fellow, and Fred Von Lohmann and Seth Schoen of the Electronic Frontier Foundation for their assistance with this testimony.

content protection to close the analog hole. Efforts to limit what consumers can record over digital radio technologies suffer from many of the same maladies as the TV broadcast flag -- specifically government control over technology design. In addition, the proposed radio content protection legislation permits the FCC extinguishes the long-protected consumer right, guaranteed by the Audio Home Recording Act, to record transmissions for personal use. Furthermore, because the draft bill will impose limits on a new technology -- so called HD Radio – that, unlike digital television, consumers need not adopt, those limits may well kill this fledgling technology. Why would a consumer buy an expensive new digital broadcast radio receiver when it would have less functionality than the current analog receiver?

The broad, sweeping draft legislation to close the analog hole suffers from the same problem; it puts the government in the role of making industrial policy, and will severely limit consumers' ability to make lawful uses of copyrighted content. Like the broadcast flag, the legislation mandates a one-size-fits-all technology that has not been the subject of public or even inter-industry scrutiny. The prohibitions in the legislation would require redesign of a whole range of currently legal consumer devices, including DVD recorders, personal video recorders and camcorders with video inputs. Importantly, the existence of the analog hole has been touted as a "safety valve" for making fair use of digital media products where circumventing the technological locks has been rendered illegal by the Digital Millennium Copyright Act. Should Congress close that hole without amending the DMCA to protect fair use, consumers' rights to access digital copyrighted works will be eroded even further.

There are better alternatives for protecting digital content than the heavy-handed technology mandates proposed here today. Those alternatives are a multi-pronged approach of consumer education, enforcement of copyright laws and use of technological tools developed in the marketplace, not mandated by government. The recent Grokster decision and the passage of the Family Entertainment and Copyright Act, which you spearheaded, Mr. Chairman, are just two of several new tools that the content industry has at its disposal to protect its content.

Any Legislation to Reinstate the Broadcast Flag or Impose Radio Copy Protection Should be Considered in Regular Order

As a preliminary matter, I would like to address an important procedural issue. If this subcommittee and the Congress ultimately decide to legislate with regard to the broadcast flag and digital radio copy protection, it should do so in regular order, and not as part of a budget resolution or appropriations bill. These matters are not germane to the budget and appropriations processes. Indeed, they are far too important and controversial to be legislated on a spending bill. If Congress ultimately decides that it must try and legislate broadcast flag and radio content protection mandates, it should do so only after considerable debate and public input.

There is considerable evidence the public is greatly concerned with the government's efforts to mandate digital television and radio content protection for digital devices. Over 5000 individual consumer comments were filed in opposition to the flag at the FCC -- where so many consumer comments are rare -- and tens of thousands of

citizens have contacted their Congressional representatives over the past 6 months (since the D.C. Circuit's decision) urging that the TV flag not be reinstated. Clearly, this is an issue that deserves a full and fair hearing, and not to be simply attached to a spending bill.[2]

An FCC-imposed Broadcast Flag Scheme and/or Radio Content Protection Scheme Will Transform the Federal Communications Commission into the Federal Copyright Commission

Despite the FCC's protestations to the contrary, the broadcast flag scheme and any radio copy protection scheme will necessarily involve the agency in shaping copyright law and the rights of content owners and consumers there under. Making copyright law and policy is not the FCC's job. It is Congress' job. Petitioners brief in *ALA v. FCC,* at 43-50, lays out this argument in great detail.

While it is true that the TV broadcast flag scheme does not completely bar a consumer from making a copy of her favorite TV show, it does prevent consumers from engaging in other lawful activities under copyright law. For example, as the D.C. Circuit noted in *ALA v. FCC*, the broadcast flag would limit the ability of libraries and other educators to use broadcast clips for distance learning via the Internet that is permitted pursuant to the TEACH Act, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301, amending 17 U.S.C. §§ 110, 112 & 882 (2002). *See ALA v. FCC*, 406 F.2d at 697.

This and other examples highlight that while proponents of the flag may justify it as prohibiting only "indiscriminate" redistribution of content over the Internet, it actually prohibits any and all distribution, no matter how limited or legal. For example, if a member of this subcommittee wants to email a snippet of his appearance on the national TV news to his home office, the broadcast flag scheme would prohibit him from doing so. Video bloggers would similarly be unable to post broadcast TV clips on their blogs. Imagine how much different the debate around broadcast decency would have been had bloggers and others not been able to post a clip of the now-infamous Janet Jackson Superbowl halftime performance?

The fact that the broadcast flag will limit lawful uses of copyrighted content was detailed in the Congressional Research Service Report entitled *Copy Protection of Digital Television: The Broadcast Flag (May 11, 2005)*. CRS concluded there that

> While the broadcast flag is intended to "prevent the indiscriminate redistribution of [digital broadcast] content over the Internet or through similar means," the goal of the flag was not to impede a consumer's ability to copy or use content lawfully in the home, nor was the policy intended to "foreclose use of the Internet to send digital broadcast content where it can be

[2] Moreover, Public Knowledge believes that any debate about technological mandates of the kind proposed here would be incomplete without a thorough consideration of how these mandates, together with the anticircumvention provisions of the DMCA, place limits on consumer rights and technological innovation. It has been suggested that H.R. 1201, "The Digital Media Consumers Rights Act" as introduced in the House Committee on Energy and Commerce, may provide a proper balance to the legal limitations imposed on consumers and innovators. Clearly this is a debate that deserves full public attention.

> adequately protected from indiscriminate redistribution." However, current technological limitations have the potential to hinder some activities which might normally be considered "fair use" under existing copyright law. For example, a consumer who wished to record a program to watch at a later time, or at a different location (time-shifting, and space-shifting, respectively), might be prevented when otherwise approved technologies do not allow for such activities, or do not integrate well with one another, or with older, "legacy" devices. In addition, future fair or reasonable uses may be precluded by these limitations. For example, a student would be unable to email herself a copy of a project with digital video content because no current secure system exists for email transmission.
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> CRS Report at 5.[3]

Thus, it strains credulity to say, as the FCC has, that the broadcast flag scheme does not put the agency in the position of determining copyright owners and consumers' rights under copyright law. It is Congress' duty, not the FCC's, to find the proper balance of those rights.

The regulatory scheme proposed under the HDRCPA similarly, and perhaps even more directly, places the FCC in the position of determining consumers' rights under copyright law. Section 101(a) of the draft bill gives the FCC the authority to

> control the unauthorized copying and redistribution of digital audio content by or over digital reception devices, related equipment, and digital networks, including regulations governing permissible copying and redistribution of such audio content.

Under this proposal, the FCC is placed in charge both of 1) determining the extent to which unauthorized copying (which is legal is some circumstances) of digital broadcast and satellite radio content is permitted; and 2) determining what kind of copying and redistribution of audio content is permissible. If this language is not giving the FCC power to set copyright policy, then it is hard to imagine what language would do so.

The Broadcast Flag and Radio Content Protection Schemes Would Give the FCC Unprecedented Control over a Wide Variety of Consumer Electronics and Computer Devices

The BFAA has been referred to by some as "narrow," because it purports to do nothing more than reinstate the FCC rule vacated by the D.C. Circuit in *ALA v. FCC.* However, for the reasons discussed below, the FCC rule is anything but narrow.

[3]The equipment incompatibility problems caused by the broadcast flag scheme are myriad, and should be taken into account by this subcommittee as it considers the BFAA. In addition to the compatibility problems discussed in the CRS report (*e.g.,* the inability to make copies on one system and play it on another), for example, none of the 13 different technologies approved by the FCC in its interim certification process are able to work with each other. This means that a consumer who buys one Philips brand flag-compliant device must buy *all* Philips brand flag compliant devices. This raises consumer costs, and also raises serious questions about competition among and between digital device manufacturers. For a detailed discussion of these issues, *see* http://www.publicknowledge.org/content/presentations/bflagpff.ppt

As the D.C. Circuit recognized in *ALA v. FCC*, the broadcast flag gave the agency unprecedented "sweeping" authority over consumer electronics and computer devices. In a nutshell, it puts the FCC in the position of deciding the ultimate fate of every single device that can demodulate a television signal. Thus, not only must television sets be pre-approved by the FCC, the agency must also pre-approve computer software, digital video recorders, cellphones, game consoles and even iPods if they can receive a digital television signal. Thus, the broadcast flag scheme places the FCC in the position of dictating the marketplace for all kinds of electronics.

The agency has neither the resources nor the expertise to engage in this kind of determination. This type of government oversight of technology design will slow the rollout of new technologies and seriously compromise US companies' competitiveness in the electronics marketplace.

Some would argue that the initial certification process worked because all thirteen technologies submitted to the FCC were approved. However, that is a very superficial view of that process. First, it is widely known that several manufacturers removed legal and consumer-friendly features of their devices before submitting them to the FCC, largely at the behest of the movie studios. Second, the changing nature of the FCC and its commissioners is likely to make for widely varying results. Given the fervor of then-Commissioner Martin's dissent to the Commission's approval of TiVo-To-Go, it is unlikely that such technology would be certified today under Chairman Martin's FCC.[4]

The HDRCPA would similarly place the FCC in the position of mandating the design of new technologies. The plain language of the draft bill gives the FCC the authority to adopt regulations governing all "digital audio receiving devices." In the case of so-called High Definition (or HD) Radio[5] this could have the unintended consequence of destroying this new technology at birth. Digital broadcast radio benefits consumers through improved sound quality (particularly for AM radio) and the ability for radio broadcasters to provide additional program streams and metadata. Unlike digital television, however, consumers need not purchase digital broadcast receivers to continue receiving free over the air broadcast radio. Certainly, if digital radio receivers have less functionality than current analog radio receivers, consumers will reject them and the market for HD radio will die. Moreover, because the HDRCPA also applies to digital satellite radio, it has the potential to cripple this increasingly popular, but still nascent, technology.

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[4] For a detailed analysis of the flaws of the FCC's certifications process, *see* Center for Democracy and Technology, *Lessons of the FCC Broadcast Flag Process* (2005), found at http://cdt.org/copyright/20050919flaglessons.pdf

[5] I say "so called," because calling a digital radio broadcast signal "High Definition" is quite misleading. Whereas in the television context, High Definition connotes a far clearer and sharper picture, an HD radio signal simply raises the quality of AM radio to FM standards, and permits the reception of broadcast radio in places where an analog signal would get cut off, such as in a tunnel or at a traffic light. Indeed, an "HD" quality signal is not even a CD quality signal. *See,* Ken Kessler, Digital Radio Sucks, it's Official, found at http://www.stereophile.com/newsletters/.

Legislation to Close the Analog Hole is Premature, Unnecessary and Would Further Tip the Copyright Balance Against Consumers

The Analog Content Protection Act is a detailed and extremely complicated technology mandate that deserves further consideration by my organization.

Preliminarily, I would note that this is the first time in the recent discussion over digital content protection that CGMS-A + VEIL technology have been proposed. While the CGMS-A + VEIL technology was discussed at the Analog Hole Reconversion Discussion Group, it was quickly dismissed as not worthy of further consideration. Thus, unlike the broadcast flag, this technology has not been fully vetted by industry and public interest groups.

Accordingly, we are quite surprised that CGMS-A + VEIL is being presented today as a fully formed, mature proposal to Congress. If Congress feels it must do something about the analog hole, it should refer the technology back to industry and public interest groups so CGMS-A+VEIL can be thoroughly analyzed for its impact on consumers and the cost to technology companies. In the complete absence of any such review, the one-sided imposition of such a detailed technology mandated would be unprecedented.

Based on a preliminary analysis of the ACPA, I would like to make the following brief substantive points:

- *The ACPA would impose an inflexible, one size fits all technology mandate that is more intrusive than the broadcast flag:* The ACPA mandates that each and every device with an analog connection obey not one, but two copy protection schemes. Thus, while the broadcast flag would put the FCC in charge of design control just for technologies that demodulate a broadcast signal, the ACPA would mandate design for *every* device with an analog connector, including printers, cellphones, camcorders, etc. Like the broadcast flag, it sets in stone a copy protection technology for technologies that are always changing.

- *The ACPA would impose a detailed set of encoding rules that would restrict certain lawful uses of content.* The proposal's tiered levels of restriction based on the type of programming (*e.g.*, pay-per-view, video on demand) limit lawful uses in a manner that ignores the four fair use factors of 17 U.S.C. §107. Thus, the draft legislation upsets the balance established in copyright law between the needs of copyright holders and the rights of the public by placing far too much control over lawful uses in the hands of the content producers.

- *Would eliminate the DMCA's safety valve*. One of the common justifications for limitations on fair use imposed by the anti-circumvention provisions of the DMCA is that the analog hole is available for individuals who, for example want to make a snippet of a DVD using a video camera

held up to the TV screen.[6] The ACPA would eliminate that safety valve.

- *The exception for legacy devices renders the ACPA ineffective.* The ACPA exempts from its grasp the millions of legacy devices with analog connectors. It is unlikely that any action to try to close the analog hole will be effective. There are millions of video recording devices in homes that will operate for years and not be covered by this act. At the same time, the ACPA will discourage sales of new products because consumers will realize that the newer technologies will have less functionality than older technologies.

- *Must be considered in the context of broadcast flag legislation*. Without broadcast flag legislation, the ACPA would be an ill-considered technology mandate that will increase costs and limit consumer rights; together with a broadcast flag mandate, the ACPA would allow nearly complete control over what consumers may do with content they have purchased or otherwise received legally.

Copyright Law and Marketplace Initiatives are Better Vehicles for Finding the Proper Balance Between Content Protection and Consumer Rights than are Government-imposed Technological Mandates

I am often asked the following question: if Public Knowledge opposes the broadcast flag, radio content protection and closing the analog hole, what are better alternatives to protect digital television and radio content from infringing uses? The best approach to protecting rights holders' interests is a multi-pronged approach: by better educating the public, using the legal tools that the content industry already has at its disposal, and the technological tools that are being developed and tested in the marketplace every day. In the past year alone, the content industry has used and won several important new tools to protect content, including:

- *The Supreme Court's decision in MGM v. Grokster and its aftermath.* The Supreme Court gave content owners a powerful tool against infringement when it held that manufacturers and distributors of technologies that are used to infringe could be held liable for that infringement if they actively encourage illegal activity. The result has been that a number of commercial P2P distributors have gone out of business, moved out of the U.S., or sold their

[6] See Testimony of Dean Marks, Senior Counsel Intellectual Property, Time Warner, Inc., and Steve Metalitz, Representing Content Industry Joint Commenters, before the Copyright Office in Rulemaking Hearing: Exemptions From Prohibitions On Circumvention Of Technological Measures That Control Access To Copyrighted Works, May 13, 2003 at 60-61: "I think the best example I can give is the demonstration that Mr. Attaway [MPAA Executive Vice President for Government Relations and Washington General Counsel] gave for you [Marybeth Peters, Registrar of Copyrights] earlier this month in Washington in which he demonstrated that he used a digital camcorder viewing the screen on which a DVD was playing to make a excerpt from a DVD film and have a digital copy that could then be used for all the fair use purposes…." (Mr. Metaliz at 60.) "I agree with everything Steve has just said about fair use copying or taking clips … with digital camcorders and analog camcorders being widely available …" (Mr. Marks at 61.)

assets to copyright holders.

- *Lawsuits against mass infringers using P2P networks.* Both the RIAA and the MPAA continue to sue individuals who are engaged in massive infringement over peer-to-peer (P2P) networks. By their own admission, these lawsuits have had both a deterrent and educative effect.

- *Passage of the Family Entertainment and Copyright Act.* The FECA gave copyright holders a new cause of action to help limit leaks of pre-release works and made explicit the illegality of bringing a camcorder into a movie theatre. It also provided for the appointment of an intellectual property "czar" to better enforce copyright laws.

- *Agreements by ISPs to pass on warning notices.* It is apparent that the war between Internet Service Providers and content companies has begun to cool. Last month, Verizon and Disney entered into an agreement by which Verizon will warn alleged copyright infringers using its networks, but will not give up their personal information to Disney.

- *Increased use of copy protection and other digital rights management tools in the marketplace.* There are numerous instances of the use of digital rights management tools in the marketplace. iTunes Fairplay DRM is perhaps the most well known, but other services that use DRM include MSN music and video, Napster, Yahoo Music, Wal-mart, Movielink, CinemaNow and MovieFlix. The success of some of these business models are a testament to the fact that if content companies make their catalogues available in an easily accessible manner, with flexibility and at a reasonable price, those models will succeed in the marketplace, without government intervention.

These tools are in addition to the strict penalties of current copyright law, including the DMCA. To the extent that the content industries are looking for a "speed bump" to keep "honest people honest," [footnote about stopping real pirates] I would contend that many such speed bumps already exist, while more are being developed every day without government technology mandates.

Finally, by far the most effective means of preventing piracy is for the content industry to do what it took the music far too long to do[7] – satisfy market demand for easy access to content at reasonable prices (which a free market will inevitably produce) that consumers can enjoy fairly and flexibly. DVDs are the best example of the market working. There, a government mandate –the Digital Video Recording Act – was rejected and an industry-agreed upon fairly weak "keep honest people honest" protection system was adopted. Despite the fact that the protection system was defeated long ago, the DVD market has grown at an astounding rate – from zero in 1997 to $25,000,000,000 in sales

[7] See Keynote Address of Edgar Bronfman, Chairman and CEO of Warner Music at http://www.tvworldwide.com/events/pff/050821/agenda.htm. "The Music Industry, like almost every industry faced with massive and rapid transformation first reacted too slowly and moderately, inhibited by an instinctive and reflexive reaction to protect our current business and business models."

and rentals last year. As I noted above, new music and movie digital download services are just now emerging in the market. We sincerely believe these efforts, if supported vigorously by the content industry, along with industry-agreed upon protection, will make government intervention in the free market unnecessary.

Conclusion

The draft bills presented here today reflect a vision of the future where government places itself squarely in the middle of technological design, and where consumers rights to make lawful uses of copyrighted content are determined by a government agency that is tasked with regulating our nation's communications system. That vision is antithetical to the largely successful and generally balanced system we have now, where the marketplace is the driver of technological innovation, and copyright law, developed by Congress, governs consumers' rights. Because this vision of the future so radically departs from the present, I urge this subcommittee to proceed slowly, with great deliberation and with input from the public given great weight.

I want to again thank Chairman Smith, Ranking Member Berman and the other members of the Subcommittee for holding this hearing to discuss how to balance digital content protection with consumer rights to make lawful uses of copyrighted works. I look forward to answering any questions you may have.